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New Jersey's Case Against the Opioid Epidemic: Prosecuting the Key Players

Lauren Russo

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I. Introduction

In 2017, President Donald Trump declared a national emergency following the recommendation of the President's Commission on Combatting Drug Addiction and the Opioid Crisis.[1] Opioid abuse is one of the nation's largest public health threats, as it takes the life of approximately 130 people per day.[2] One reason that the opioid epidemic has escalated at the rates it has is because one in three Americans suffer from chronic pain, and consequently, acquire prescriptions for pain medication such as oxycodone and acetaminophen/hydrocodone.[3] While these opioids are effective and sometimes necessary forms of pain management, they also are highly addictive, particularly when misused.[4]

So how did we as a nation get to this point? It has been said that the opioid epidemic has occurred in three waves.[5] The first wave began in the 1990s when doctors increasingly and liberally began prescribing opioids to treat patients' pain following reassurances from pharmaceutical companies that there was a low risk of addiction associated with the drugs.[6] For example, Purdue Pharma, producer of OxyContin, spent hundreds of millions of dollars to aggressively market their drug to prescribers, touting this claim.[7] The company sent salesmen out

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[1] Lawrence O. Gostin, James G. Hodge & Sarah A. Noe, *Reframing the Opioid Epidemic as a National Emergency*, 318 JAMA NETWORK 1539, 1539 (2017).
[2] Centers for Disease Control and Prevention, *Opioid Overdose: Understanding the Epidemic* (Dec. 19, 2018), https://www.cdc.gov/drugoverdose/epidemic/index.html.
[3] Gostin et al., *supra* note **Error! Bookmark not defined.**.
[4] *Id.*
[5] Lindsy Liu, Diana N. Pei, & Pela Soto, *History of the Opioid Epidemic: How Did We Get Here?*, POISON CONTROL, https://www.poison.org/articles/opioid-epidemic-history-and-prescribing-patterns-182.
[6] *Id.*
[7] Richard Gunderman, *OxyContin: How Purdue Pharma Helped Spark the Opioid Epidemic*, THE CONVERSATION (Apr. 19, 2016, 6:08 AM), https://theconversation.com/oxycontin-how-purdue-pharma-helped-spark-the-opioid-epidemic-57331.

across the company to distribute marketing and promotional materials for OxyContin, a tactic the US Drug Enforcement Agency claims was "unprecedented" for such a narcotic.[8] Furthermore, Purdue sponsored various all-expense-paid conferences, attended by physicians, pharmacists, and nurses from across the country, regarding pain management and the role of OxyContin in pursuing it.[9] Adding fuel to the fire, a group of physicians, particularly the American Pain Society, began arguing the medical profession as a whole was failing to adequately treat pain due to "erroneous concerns about addiction."[10] The group accordingly urged for physicians to more generously prescribe opioids.[11] This perfect storm convinced medical professionals, and the FDA, that OxyContin was safe for the long-term treatment of patients with chronic pain.[12] Notwithstanding this belief, OxyContin's skyrocketing sales—from $48 million in 1996 to $1.1 billion in 2000—correlated with increased rates of abuse and addiction.[13]

The second wave of the opioid epidemic began around 2010 once the addictive qualities of the drugs came to light, and remedial efforts to decrease opioid prescriptions began to take effect.[14] As prescriptions for opioids became harder to obtain, addicts began turning to heroin—a widely available alternative.[15] In fact, 80% of heroin users admitted to using prescription opioids before resorting to heroin.[16] Ultimately, deaths caused by heroin overdose increased by 286% from 2002 to 2013.[17]

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[8] Dan Mager, *Where Did the Opioid Epidemic Come From? Part One of Two*, PSYCHOLOGY TODAY (Sept. 21, 2017), https://www.psychologytoday.com/us/blog/some-assembly-required/201709/where-did-the-opioid-epidemic-come-part-one-two.
[9] *Id.*
[10] Gunderman, *supra* note 7.
[11] *Id.*
[12] Mager, *supra* note 8.
[13] *Id.*
[14] Lindsy Liu et al., *supra* note 5.
[15] *Id.*
[16] *Id.*
[17] *Id.*

The third wave of the opioid epidemic began in 2013, when deaths related to synthetic opioids, such as fentanyl, sharply increased.[18] Illicitly-manufactured fentanyl is often used to replace and model heroin when sold to unsuspecting users.[19] In 2016, there were over 20,000 deaths in the United States from fentanyl and related drugs.[20]

New Jersey, in particular, has felt the crippling effects of the national opioid epidemic. Since 2004, New Jersey has experienced over 14,000 overdose deaths.[21] Accordingly, drug overdose is the leading cause of accidentals deaths in the state, topping car accidents.[22]

While the opioid epidemic is mainly considered a public health crisis, it is also fueled by criminal activity because people wrongly provide access to, sell, and purchase illicit opioids. Because selling opioids is so lucrative and the addictive qualities of the drugs are so strong, the opioid market is extremely prosperous. While public health efforts are primarily used to minimize the effects of opioid addiction, the grim reality is that the crisis will not come to an end unless the criminal law is used, in conjunction with public health measures, to interrupt the market.

This Comment will focus on New Jersey's efforts to combat the opioid crisis using criminal law. Part II of this Comment will explain and analyze the measures New Jersey has taken against each key player in the opioid epidemic—users, dealers, and prescribers. Specifically, it will examine how criminal law has played a role in combatting the epidemic with respect to each key player. Part III will provide a more in-depth analysis of where New Jersey went right and went wrong with its actions. For where it went wrong, this comment will offer suggestions about how

[18] *Id.*
[19] *Id.*
[20] Lindsy Liu et al., *supra* note 5.
[21] *New Jersey's Drug Addiction Crisis*, NJTV, https://www.njtvonline.org/addiction/.
[22] *Id.*

the state can alter the ways in which it charges and prosecutes the key players in the opioid epidemic.

II. Key Players in the Opioid Epidemic

While there are many actors involved in the opioid epidemic, this Comment will focus on three key players: opioid users, dealers, and prescribers. This Section will detail how each player contributes to the crisis. It will further describe the actions New Jersey has taken, with respect to each player, in alleviating the effects of the opioid epidemic.

A. Opioid Users

Cristin was 18 years old the first time she took OxyContin.[23] A doctor prescribed the pain medication to her in 1998 after she had injured her lower back in a car accident.[24] After suffering from constant pain and hopelessness due to the ineffectiveness of physical therapy, Cristin took the pills as prescribed so she could continue working as a waitress.[25] Cristin took the OxyContin for a full year before her doctor finally refused to refill her prescription, advising her she has been taking it for too long.[26] He recommended a pain clinic in lieu of the pills to manage her pain.[27] Unfortunately, the clinic didn't take her insurance and left Cristin seeking out an alternative that would allow her some relief from the pain.[28] Time was limited because the withdrawal symptoms—vomiting and chills—were starting to introduce themselves.[29] Then the answer to all her problems appeared when her boyfriend's brother offered her a bit of heroin to try.[30] Cristin

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[23] *Overcoming Opioid Addiction: A Woman Shares her Story*, YALE MEDICINE (Feb. 28, 2017), https://www.yalemedicine.org/stories/overcoming-opioid-addiction/
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Overcoming Opioid Addiction: A Woman Shares her Story*, *supra* note **Error! Bookmark not defined.**.
[30] *Id.*

explained that she "sniffed it at first, and it made all my sickness go away."[31] Cristin spent the majority of her 20s addicted to heroin and underwent the process of detoxing and relapsing repeatedly.[32]

Cristin's story is not uncommon. Eighty percent of Americans facing heroin addiction admit that their addiction began with a legitimate prescription for pain killers, often from the 1990s or early 2000s when opioids were widely available.[33] Once their supply of prescription pain killers is cut off, and they are unable to illicit another prescription, users often turn to heroin, an opioid that is easily obtainable on the street.[34] This transition is not unusual because opioids are essentially a controlled, legal form of heroin.[35] When taken incorrectly or in high doses, prescription painkillers have similar effects on the brain as heroin.[36] When heroin enters the brain, it is converted to morphine.[37] "The molecules then bind to the opioid receptors located in several areas of the brain, including the ones involved with perceptions of both pain and rewards."[38] Heroin, ultimately, rewards users with a feeling of euphoria. Prescription opioids work in a similar way by "attaching to these same receptors found within the brain and reducing the perception of pain."[39] They can also cause the euphoric response when taken at higher doses.[40]

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[31] *Id.*
[32] *Id.*
[33] Kayleen Egan, Comment, *The Overdose Prevention Act: A Small Step When New Jersey Needs a Giant Leap*, 12 RUTGERS J.L. & PUB. POL'Y 1, 3 (2014); PRESCRIPTION OPIOIDS AND HEROIN, NATIONAL INSTITUTE ON DRUG ABUSE 6 (2018), https://www.drugabuse.gov/node/pdf/19774/prescription-opioids-and-heroin.
[34] Egan, *supra* note 33, at 4; Katie Hiller, *Heroin Deaths in NJ Three Times National Average*, Whyy (Jul. 17, 2015), https://whyy.org/articles/heroin-deaths-in-nj-three-times-national-rate/.
[35] Egan, *supra* note 33, at 3.
[36] Shelby Leheny, *The Connection Between Prescription Opioids and Heroin*, PHARMACY TIMES (Sept. 12, 2016), https://www.pharmacytimes.com/contributor/shelby-leheny-pharmd-candidate-2017/2016/09/the-connection-between-prescription-opioids-and-heroin.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

Aside from accessibility, another factor that usually encourages a user's transition from painkillers to heroin is that heroin is a cheaper alternative.[41] Prescription painkillers typically cost between $25-$50 per pill, while heroin costs approximately $5-$20 per bag, or per single dose.[42]

In New Jersey, the rate of heroin overdoses is three times the national average.[43] Heroin-related deaths now "eclipse homicide, suicide, car accidents, and AIDS as a cause of death in the state."[44] This could be attributed to the fact that heroin is apparently "pouring" into New Jersey through Port Elizabeth and Newark.[45] Additionally, Bob Baxter, the former director of the needle exchange program in Newark, attributes this frightening reality to the "perfect storm of accessibility, affordability, and acceptability" when it comes to the deadly drug.[46] This "perfect storm" has proven to be so catastrophic that even groups that are historically not at high risk for heroin addiction—women, Caucasians, the wealthy, and adults aged 18 to 25—have significantly contributed to the dramatic spikes in opioid abuse in recent years.[47] In fact, over the last decade, treatment for opioids has been "spread evenly across all the state's demographics."[48] Senator Joseph Vitale compares opioid addiction to alcoholism in that, "[a]lcoholism has long been acknowledged to exist across all socio-economic classes. We accept that. As a culture, we have to accept that drug addiction causes the same damage. Until we acknowledge that, we'll never turn the corner."[49]

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[41] Egan, *supra* note 33, at 4.
[42] *Id.*; Thomas Christiansen & Sendra Yang, *How Much is Heroin?*, THE RECOVERY VILLAGE (Oct. 11, 2019), https://www.therecoveryvillage.com/heroin-addiction/how-much-is-heroin/.
[43] Stephen Stirling, *N.J. Heroin Overdose Death Rate is Triple the Soaring U.S. Rate*, NJ.COM (Jun. 8, 2015), https://www.nj.com/news/2015/07/nj_heroin_overdose_death_rate_is_triple_the_soarin.html.
[44] *Id.*
[45] *Id.*; *See e.g.*, Rodrigo Torrejon, *About 1.6 Tons of Cocaine Seized at Port Newark, Largest Drug Bust in 25 Years*, NORTHJERSEY.COM (Mar. 11, 2019, 9:44 AM), https://www.northjersey.com/story/news/new-jersey/2019/03/11/1-6-tons-cocaine-seized-port-newark-largest-bust-25-years/3128185002/.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Stirling, *supra* note 43.

This data has caught the New Jersey Legislature's attention and spurred a more sympathetic attitude towards addiction.[50] This sympathy is exemplified through New Jersey's responses when it comes time to charge and prosecute illicit drug users. Overall, it appears as though New Jersey's focus is primarily on treating addiction; however, the state's actions indicate that some accountability must remain with illicit drug users in order to curb the opioid epidemic.

1. Immunity Statue

Enacted as part of Governor Chris Christie's Overdose Prevention Act, N.J. Stat. § 2C:35-30 (2013) grants "immunity from liability,[51] [in] certain circumstances, for persons seeking medical assistance for someone experiencing a drug overdose."[52] This immunity also applies to the individual experiencing the overdose, as well as those "working in collaboration" to request medical attention for that individual, meaning not just the person making the 911 call.[53] This statute is one way New Jersey emphasizes treatment and exemplifies a sympathetic attitude to addiction, rather than focusing on accountability. It was enacted with the purpose of encouraging people to seek help when someone is overdosing.[54] It achieves this purpose by eliminating, from the person seeking help, the fear of being charged and prosecuted if they solicit aid from law enforcement or emergency medical services.[55]

That being said, the immunity only applies if (1) the person seeking medical attention acts in good faith; (2) the person seeking medical attention does so for another person who is experiencing an overdose and is in need of medical assistance; and (3) the evidence for an arrest, charge, prosecution, conviction, or revocation was obtained as a result of seeking medical

[50] *See id.*
[51] Liability refers to drug charges in connection with an individual's overdose. Egan, *supra* note 33, at 5.
[52] N.J. Stat. § 2C:35-30 (2013).
[53] Egan, *supra* note 33, at 5 n.29, 16.
[54] *Id.* at 17.
[55] *See* N.J. Stat. § 2C:35-30 (2013).

assistance.[56] It is important to note, however, that the statute does not grant immunity for distribution or intent to distribute.[57] This statutory construction can be problematic because it is common for a drug dealer to use drugs with the individuals he or she sells to.[58] Thus, if someone overdoses and their drug dealer calls for medical assistance, the dealer can still be charged with distribution or intent to distribute.[59] It has been suggested that if New Jersey is serious about its goal of encouraging people to call for help when someone is experiencing an overdose, it must broaden its immunity statute to cover drug distribution or intent to distribute charges.[60] Alternatively, at the very least, it could allow consideration of the fact that the dealer sought out medical attention for someone experiencing an overdose as a mitigating factor in court.[61]

Moreover, the immunity statute does not apply to concurrent crimes happening while someone is seeking medical attention for an individual who is overdosing. For example, in Kentucky, a drug user was charged with endangering the welfare of others after he called to report an overdose.[62] Apparently, the fentanyl that was present on the overdose victim's body was so potent that it seeped into the responding paramedic's skin and made him ill.[63] Kentucky has an immunity statute that similarly does not apply to other crimes that may occur at the scene of the overdose.[64] While broadening the immunity statute to cover all unrelated crimes happening at the scene of the overdose may be beyond reason, the statute should be expanded to at least cover crimes rationally related to the overdose. This would prevent the statute from being "diluted" and

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[56] *Id.*
[57] *See Id.*
[58] Egan, *supra* note 33, at 12.
[59] *See* § 2C:35-30.
[60] Egan, *supra* note 33, at 12.
[61] *Id.*
[62] Albert B. Kelly, *With Lives at Stake, Don't Dilute Good Samaritan Overdose Laws*, NJ.COM (Jul 8, 2019), https://www.nj.com/opinion/2019/07/with-lives-at-stake-dont-dilute-good-samaritan-overdose-laws-opinion.html
[63] *Id.*
[64] *See Id.*

the state from using "work-arounds" to charge people for crimes not explicitly covered in the statute.[65]

2. Operation Helping Hand

In June 2019, Attorney General Gurbir Grewal and the Office of the New Jersey Coordinator for Addiction Responses and Enforcement Strategies ("NJ CARES") announced that over two million dollars of state funds would be allocated to establishing and expanding a county-based diversion program called "Operation Helping Hand."[66] Operation Helping Hand entails one-week stints during which law enforcement proactively assists individuals in obtaining treatment once it has been determined that they suffer from opioid addiction.[67] To date, eighteen counties already have participated in Operation Helping Hand.[68] In regards to the program, Grewal says, "Operation Helping Hand represents a different kind of policing, where the goal is not to rack up arrests but to offer individuals using illicit drugs the help they need to break the cycle of addiction."[69]

The logistics of the program are as follows: it begins with law enforcement arresting an individual for purchasing opioids, usually heroin, in an open-air market.[70] When the individual is brought to the police station for processing, recovery specialists are already there waiting to connect that individual with options for treatment services.[71] While the charges are not ultimately dropped against the individual, the particular prosecutor's office makes every effort to "place him

[65] *Id.*
[66] Anthony Vecchione, *'Operation Helping Hand' gets $2.2M boost for diversion program expansion*, NJBIZ (Jun. 20, 2019), https://njbiz.com/operation-helping-hand-gets-2-2m-boost-diversion-program-expansion/.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

or her on the path to recovery."[72] Often, judges are made aware of the individuals who accepted treatment, which can be used as a mitigating factor in sentencing.[73]

Operation Helping Hand has thus far been successful in encouraging people into treatment after they have been arrested and charged. For example, during one week in June 2018, five counties made a collaborative effort to get those who were arrested on low-level drug charges into treatment.[74] Out of the 177 individuals who were arrested, 80% accepted the offered treatment.[75] The offered treatment included an opportunity to speak to a recovery specialist, and depending on the severity of one's addiction, access to a treatment facility.[76]

Another success story from the program belongs to Cliffside Park resident, Matt Albanese, a seven-year addict who was charged with heroin possession during Bergen County's Operation Helping Hand campaign in April 2017.[77] Albanese and a friend had just purchased and shot three bags worth of heroin when a police officer pulled his Jeep over.[78] This was Albanese's second arrest in one week.[79] This arrest was different from his previous ones over the years: this time, Albanese was persuaded into a detox program at Bergen Regional Medical Center as a part of Operation Helping Hand.[80] As of January 2018, nine months later, Albanese was still clean.[81]

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[72] Vecchione, *supra* note 6666.
[73] Steve Janoski, *Prosecutor: Recovery Program Helped Disrupt Addiction*, NORTHJERSEY.COM (Jan. 4, 2018), https://www.northjersey.com/story/news/crime/2018/01/04/prosecutor-says-operation-helping-hand-helped-disrupt-cycle-addiction-some/990732001/.
[74] Stephen Johnson, *New Jersey's 'Operation Helping Hand' Offers Treatment, Not Stigma, To Arrested Drug Users*, BIG THINK (Jun. 28, 2018), https://bigthink.com/stephen-johnson/operation-helping-hand-80-of-arrested-drug-users-in-nj-accept-free-treatment-in-experimental-program.
[75] *Id.*
[76] *Id.*
[77] Janoski, *supra* note 73.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*

Albanese explains that the arrest was the "kick in the teeth he needed," and was "a blessing in disguise."[82]

Attorney General Grewal commented, "[t]he way I measure success is if we break the cycle for one person."[83] He says, "[t]hat's one less potential overdose, that's one less potential death. And I think we've seen that happen here."[84] Stories like Albanese's are an indication the program is working, considering Bergen County "didn't go a day without a heroin arrest, an overdose, or . . . a Narcan save" in 2016.[85]

3. Drug Courts

It is believed that some type of punishment for those with drug convictions is necessary to protect society because, despite drug use being illegal in and of itself, "drugs are widely believed to be causally related to violent crimes such as robbery, theft, or assault."[86] On the other hand, it is also widely believed that drug usage and addiction are often just expressions of mental health problems, which calls for treatment.[87] Thus, New Jersey has implemented drug courts which "straddle the criminal and health aspects of drug offenses."[88]

A drug court program is a specialized form of probation given to individuals who are facing prison-time, but "whose crimes were motivated by drug addiction."[89] There are three main factors that determine if an individual is eligible for drug court: an individual must (1) be 18 years or

[82] *Id.*
[83] Janoski, *supra* note 73.
[84] *Id.*
[85] *Id.*
[86] Stephen Hunter et al., *New Jersey Developments: New Jersey's Drug Courts: A Fundamental Shift from the War on Drugs to a Public Health Approach for Drug Addiction and Drug-Related Crime*, 64 RUTGERS L. REV. 795, 818 (2012).
[87] *Id.*
[88] *Id.*
[89] Daniel M. Rosenberg & Associates, LLC, *New Jersey Drug Court: Can Drug Court Help You Turn Your Life Around?*, https://www.danielmrosenberg.com/practice-areas/criminal-defense/drug-crimes/drug-court/.

older; (2) suffer from substance abuse; and (3) be facing charges for a non-violent crime.[90] The purpose of drug courts is to reduce crime by changing and shaping a defendant's behavior.[91] It does so by allowing a defendant, in exchange for a guilty plea, to be diverted to drug court program instead of traditional probation or short-term incarceration.[92] The drug court program is then geared towards helping individuals obtain treatment for their addiction and preventing their further involvement in the legal system.[93] If a person does not complete the drug court program, then they are required to serve their original sentence, whether it be probation or prison.[94]

A typical drug court program entails regular court appearances and meetings with probation officers; random drug testing; residential programs, outpatient programs, and/or counseling; relapse prevention programs; community service; and more.[95] Accordingly, drug court programs, like Operation Helping Hand, strike a balance between holding drug users accountable while still prioritizing rehabilitation over incarceration. One of drug courts' main goals is to help those suffering from addiction get into treatment.[96] At the same time, drug court programs remain a punishment in a sense because they can be a "burdensome or painful expression of public censure by a legitimate authority."[97] While compulsory treatment and extensive monitoring may be preferable to prison, they can still be considered an onerous deprivation of liberty.[98] Drug courts can thus be seen as "a hybrid of public health law and criminal law

[90] *Id.*
[91] Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes," Government Accountability Office, GAO-05-219, 3 (Feb. 2005), https://www.gao.gov/new.items/d05219.pdf
[92] *Id.*
[93] Rosenberg & Associates, LLC, *supra* note 8989.
[94] *Id.*
[95] *Id.*
[96] *See* Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes, *supra* note 9191.
[97] Hunter et al., supra note 8686, at 819.
[98] *Id.*

because drug courts have incorporated successful public health strategies into the criminal law to achieve better outcomes, such as reduced recidivism . . . and the optimization of public safety."[99]

B. Opioid Dealers

Where there is a demand, there is a supply. Drug cartels have noticed the uptick in opioid addiction over the past two decades, and have strategically entered the growing market to fill a specific need—a cheap alternative to prescription pills, namely heroin.[100] It is no coincidence that the increased use of heroin in the United States correlates with heroin's increased availability.[101] This widespread availability of heroin is fueled by the increased production and trafficking of heroin by Mexican criminal networks, which are responsible for the majority of heroin present in the United States.[102] "Mexican transnational criminal organizations (TCOs) 'remain the greatest criminal drug threat to the United States; no other group is currently positioned to challenge them.'"[103] TCOs typically smuggle heroin into the United States through legal ports of entry often using privately owned vehicles and tractor trailers.[104] They also form relationships with U.S. gangs to facilitate the distribution and sale of heroin in the United States.[105] Distribution of heroin and other drugs is typically the main source of revenue for these gangs.[106] Charging and prosecuting these traffickers falls primarily under federal law;[107] however, once the drugs get into the hands of mid and low-level dealers for purposes of distribution, state criminal law often comes into play.

When it comes to how New Jersey is utilizing the criminal law to deter opioid distribution, the state's biggest misstep is how it charges and prosecutes low-level opioid dealers, particularly

[99] *Id.* at 796.
[100] Christiansen & Yang, *supra* note 42.
[101] CONGRESSIONAL RESEARCH SERVICE, HEROIN TRAFFICKING IN THE UNITED STATES 1 (2019).
[102] *Id.*
[103] *Id.* at 2
[104] *Id.*
[105] *Id.* at 3.
[106] *Id.*
[107] *See* CONGRESSIONAL RESEARCH SERVICE, *supra* note 101101, at 5–6.

when a death results. The enmity that law enforcement and prosecutors feel towards dealers is not altogether unjustified; however, the force with which they go after many low-level dealers might be misguided. At the root of this problem is a powerful drug called fentanyl, which is driving the third and current wave of the opioid epidemic.

1. Fentanyl

A major problem that the state is facing is the use of a drug called fentanyl, which is more powerful, cheaper, and more accessible than heroin.[108] It is common for opioid dealers, specifically low or mid-level dealers, to mix fentanyl with heroin and sell it to unsuspecting buyers.[109] Fentanyl is a synthetic opioid that is "fifty times more potent than heroin" and "one hundred times more so than morphine."[110] In fact, it is so dangerous that "law enforcement, public health workers, and first responders who unknowingly come into contact with it—absorbed through the skin or through accidental inhalation of airborne powder—can be put at serious risk."[111]

Because fentanyl is so cheap, it makes dealing it a much more lucrative endeavor than dealing heroin.[112] While some users seek out fentanyl, many unknowingly ingest it when a dealer underhandedly mixes it in and misrepresents the end product as pure heroin.[113] Fentanyl can easily be disguised as white-powder heroin or as a core ingredient in fake prescription pills.[114] Using fentanyl is so profitable for dealers that doing so justifies the risk of losing a loyal customer to a

[108] Rachel L. Rothberg & Kate Stith, Symposium, *Law and the Opioid Crisis: Fentanyl: A Whole New World?*, 46 J.L. MED. & ETHICS 314, 314 (2018).
[109] *Id.* at 315.
[110] *Id.* at 314.
[111] *Id.*
[112] *Id.* at 315.
[113] *Id.*
[114] Rothberg & Stith, *supra* note 108108, at 315.

potential overdose because of it.[115] Consequently, fentanyl often plays a role in overdoses and subsequent prosecutions of dealers in drug-induced homicide cases.[116]

2. Strict Liability for Drug-Induced Homicides

In 2013, Matthew Weisholz, a man who considered himself a "full-blown addict," supplied his ex-girlfriend, Erin Idone, with heroin and a needle.[117] Idone, an addict herself, injected the heroin in Weisholz's presence and subsequently died of an overdose.[118] Weisholz was charged and convicted of drug-induced homicide under New Jersey's strict liability law.[119]

New Jersey Statute 2C:35-9 provides that "[a]ny person who manufactures, distributes or dispenses methamphetamine . . . or any other controlled dangerous substance classified in Schedules I or II . . . is *strictly liable for a death* which results from the injection, inhalation or ingestion of that substance, and is *guilty of a crime of the first degree*."[120] The statute also provides that it "shall not be a defense to a prosecution under this section that the decedent contributed to his own death by his purposeful, knowing, reckless or negligent injection, inhalation or ingestion of the substance, or by his consenting to the administration of the substance by another."[121] Lastly, it provides that "[n]othing in this section shall be construed to preclude or limit any prosecution for homicide."[122]

Because the statute does not denote any mens rea term, and instead specifies strict liability, it follows that a drug dealer may end up with a homicide (murder or manslaughter) charge,

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[115] *Id.*
[116] *Id.*
[117] DRUG POLICY ALLIANCE, AN OVERDOSE DEATH IS NOT MURDER: WHY DRUG-INDUCED HOMICIDE LAWS ARE COUNTERPRODUCTIVE AND INHUMANE 32 (2017), http://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf.
[118] *Id.*
[119] *Id.*
[120] N.J. Stat. § 2C:35-9 (2018) (emphasis added).
[121] *Id.*
[122] *Id.*

regardless of his or her intent to harm the user. Furthermore, it is significant to note that those found responsible for drug-induced deaths are guilty of a first-degree crime. In New Jersey, first-degree crimes "are the most serious criminal offense[s] that one might commit" and carry a minimum prison term of 10 to 20 years.[123] In comparison, a typical distribution charge that does not result in death is usually a second or third-degree crime, which carries a 5 to 10 or 3 to 5-year prison term, respectively.[124]

The original intent of New Jersey's strict liability statute was to provide prosecutors with a means to go after upper-level drug dealers "who could rarely be connected to the drugs."[125] However, this statute has not been used for its intended purpose.[126] For example, in the early 2000s, New Jersey prosecuted thirty-two drug-induced homicide cases.[127] Out of those cases, twenty-five did not involve the prosecution of those considered high-level dealers.[128] Instead, the prosecutions targeted friends and family members who provided drugs to the decedent.[129] Many prosecuted under strict liability drug-induced homicide statutes suffer from addiction, themselves.[130]

In State v. Maldonado, the New Jersey Supreme Court upheld the constitutionality of § 2C:35-9.[131] The defendant in this case obtained heroin for a friend as a favor, receiving no

[123] Travis Tormey, *Degrees of Crimes in New Jersey*, MORRISTOWN N.J. CRIM. L. POST (Jan. 26, 2011), https://www.morristownnjcriminallawpost.com/criminal-process/degrees-of-crimes-in-new-jersey/.
[124] *Id.*; State v. Maldonado, 137 N.J. 536, 544 (1994).
[125] Egan, *supra* note 33, at 31–32.
[126] *Id.*
[127] DRUG POLICY ALLIANCE, *supra* note 117117, at 3.
[128] *Id.*
[129] Egan, *supra* note 33, at 31–32.
[130] Rosa Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html.
[131] State v. Maldonado, 137 N.J. 536, 545 (1994).

compensation.[132] When the friend was found dead the next day from an overdose, the defendant plead guilty under § 2C:35-9 and was sentenced to prison for fifteen years.[133]

Prosecutions of this sort even include cases of friends and significant others *sharing* drugs, rather than someone providing drugs to another.[134] It is quite clear from these circumstances that there was never an intention for anyone to get hurt. In fact, "some defendants had tried to save the life of the victims by calling 911, attempting C.P.R. or administering naloxone, an overdose-reversal medication."[135] Ultimately, that does not matter; prosecutors need only prove that the defendant "provided the drugs or helped the victim obtain them," not that the death was intentional.[136] Furthermore, many of the drug-induced homicide prosecutions have recently been driven by the spike in fentanyl-related overdose deaths.[137] It is often the case that family, friends, and sometimes even low-level street dealers are unaware when fentanyl has been added to the heroin.[138]

Some believe these vigorous prosecutions will help deter drug use and allow those suffering from addiction to "hit bottom," which will ultimately provide them with the motivation they need to seek treatment.[139] Others view these prosecutions as a way to solace grieving families by punishing the wrongdoer.[140] The latter is a legitimate interest of the state. One prosecutor justified the prosecutions by saying, "I look at it in a real micro way. You owe me for that dead kid."[141] While the state does need to hold suppliers accountable, a strict liability homicide charge

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[132] *Id.*
[133] *Id.*
[134] *See* Goldensohn, *supra* note 130130.
[135] *Id.*
[136] *Id.*
[137] DRUG POLICY ALLIANCE, *supra* note 117117, at 16.
[138] *Id.* at 17.
[139] Goldensohn, *supra* note 130130.
[140] *Id.*
[141] *Id.*

is not the way to do it, particularly because this method has proven to be overly punitive and unsuccessful in deterring drug deals.

For instance, Ocean County brings the majority of the drug-induced homicide charges in New Jersey.[142] Former Ocean County prosecutor, Joseph Coronato, was a proponent of investigating and bringing drug-induced homicide charges—in a two-year period while Coronato was in office, there were eighteen arrests using the charge.[143] The office remembers only one drug-induced homicide arrest prior to Coronato's arrival.[144] Coronato calls the strict liability drug-induced homicide statute his "checkmate statute" due to the ease in which the homicide unit can gather evidence to support a strict liability charge.[145] He also "views drug-induced homicide as an effective tool for combatting the overdose crisis" because it allows him to send a "signal loud and clear."[146]

Despite Coronato's efforts, overdose rates in Ocean County have steadily increased.[147] He himself admits that overdose fatalities continue to "spiral out of control" in Ocean County as well as in the rest of New Jersey.[148] What is the reason for this? The answer points to the strong market for opioids.

> [D]rugs are cheaper, stronger, and more widely available than at any other time in US history. Supply follows demand, so the supply chain for illegal substances is not eliminated because a single seller is incarcerated, whether for drug-induced homicide or otherwise. Rather, the only effect of imprisoning a drug seller is to open the market for another one. Research consistently shows that neither increased arrests nor increased severity of criminal punishment for drug law violations results in less use (demand) or sales (supply). In other words, punitive sentences for drug offenses have no deterrent effect.[149]

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[142] DRUG POLICY ALLIANCE, *supra* note 117, at 32.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] DRUG POLICY ALLIANCE, *supra* note 117117, at 32.
[149] *Id.* at 2.

What punitive statutes may have a deterrent effect on, though, is the "seeking of life-saving medical assistance."[150] The people who are positioned to save the life of an individual experiencing an overdose often happen to be the ones who provided that individual with drugs. Accordingly, those people might be hesitant to call 911 if they know they could be charged with homicide if the person overdosing ultimately dies.[151] And they may not be immune from liability for calling 911 under New Jersey's immunity statute because the statute does not cover distribution charges, particularly when a death results.[152] This happened to Jennifer Marie Johnson, who called 911 to seek medical help for her husband who was overdosing on the methadone she provided him.[153] Her husband ultimately died, and Johnson is currently serving a six-year prison sentence for drug-induced homicide.[154] The act of vigorously prosecuting and making examples out of people who provide drugs to others may ultimately lead to a "chilling effect on calling for medical attention" and thus lead to more fatal overdoses.[155]

C. Opioid Prescribers

Due to various competing interests, it appears New Jersey's biggest challenge is charging and prosecuting physicians in connection with the opioid epidemic. While it is no easy task, New Jersey should consider ramping up its actions against opioid prescribers, as they are often the root cause of many peoples' struggle with addiction. Previous New Jersey Attorney General, Christopher Porrino, said, "[d]octors who act like drug dealers and illegally dole out prescriptions for these highly addictive painkillers are nothing more than drug pushers in white coats, and they

[150] *Id.* at 3.
[151] *Id.*
[152] N.J. Stat. § 2C:35-30 (2013); *see* DRUG POLICY ALLIANCE, *supra* note 117117, at 3.
[153] DRUG POLICY ALLIANCE, *supra* note 117117, at 3.
[154] *Id.*
[155] *Id.*

are even more dangerous than a street dealer, because we trust that our doctors will protect our health and not hurt or kill us."[156]

A few common ways in which physicians have contributed to the opioid epidemic through illegal conduct are by prescribing, or overprescribing, opioids without a legitimate medical purpose and by operating "pill mills."[157] The operation of a pill mill is a common scheme in which doctors will exchange pills for cash, without administering any medical care.[158] For example, in 2017, a New Jersey doctor and sixteen others were caught operating a state-wide drug ring, which entailed the distribution of thousands of opioid pills including Oxycodone.[159] The doctor allegedly "sold prescriptions for cash to the ring of 16 drug dealers, writing fraudulent prescriptions for individuals who had no legitimate medical need for the highly addictive pills."[160] He was charged with second-degree distribution of narcotics.[161]

Another way in which physicians have fueled the opioid epidemic is by improperly prescribing opioids to unwitting patients who do not necessarily require them.[162] For example, a New Jersey family physician, Vivienne Matalon, prescribed a powerful painkiller called Subsys to three of her patients, one of whom died.[163] Subsys is a drug so powerful and the risks of addiction and overdose are so great that the Food and Drug Administration has approved its use

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[156] Steve Birr, *Doctor Busted Running a Drug Ring That Would Make Walter White Jealous*, Daily Caller (Jul. 20, 2017), https://dailycaller.com/2017/07/20/doctor-busted-running-a-drug-ring-that-would-make-walter-white-jealous/.
[157] *See* Tom Davis, *NJ Opioid Ring: Doctor, 17 Others Busted, AG Says*, PATCH (Jul. 19, 2017), https://patch.com/new-jersey/oceancity/n-j-doctor-17-others-statewide-high-dose-opioid-bust.
[158] Kelly K. Dineen & James M. DuBois, *Between a Rock and a Hard Place: Can Physicians Prescribe Opioids To Treat Pain Adequately While Avoiding Legal Sanction?*, 42 AM. J. L. AND MED. 7, 42 (2016).
[159] Davis, *supra* note 157157.
[160] *Id.*
[161] *Id.*
[162] Tom Davis, *31 N.J. Doctors Lost Jobs in Statewide Opioid Crackdown*, PATCH (Mar. 2, 2017), https://patch.com/new-jersey/tomsriver/31-n-j-doctors-lost-jobs-statewide-opioid-crackdown.
[163] *Id.*

only for cancer patients who suffer from intense pain.[164] Sarah Fuller didn't have cancer; she suffered from painful fibromyalgia, yet Matalon prescribed her Subsys anyway.[165] Fuller ended up dying from the "adverse effects of the drug" because it was prescribed to her for "off-label conditions."[166] While it is not illegal to prescribe drugs for off-label conditions, doing so may raise ethical concerns, particularly when risky opioids are involved.[167] It is unclear what Matalon's motivation for prescribing the Subsys was; however, it has been revealed that the pharmaceutical company that produced Subsys was orchestrating a scheme in which they paid doctors bribes in exchange for prescribing the drug.[168] Consequently, the drug was prescribed to an "inappropriately broad array of pain patients," many of whom did not need it.[169] The State Board of Medical Examiners revoked Mantalon's license for jeopardizing the welfare of her patients.[170] Matalon faced no criminal charges and is eligible to seek reinstatement of her license in 2020.[171]

In response to the troubling circumstances surrounding questionable and illegal physician activity, New Jersey has enacted some of the strictest regulations in the country in regards to painkiller prescriptions.[172] On February 15, 2017, Governor Chris Christie of New Jersey signed legislation aimed at aggressively addressing the opioid epidemic.[173] Part of that legislation

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[164] David Armstrong, *A Potent Painkiller, And The Drug Maker's Marketing, Are Faulted in A Woman's Death*, STAT (Sep. 30, 2016), https://www.statnews.com/2016/09/30/fentanyl-opioid-insys-subsys/.
[165] *Id.*
[166] *Id.*
[167] Elizabeth Zimmerman, *Prescribing an Overdose: A Chapter in the Opioid Epidemic*, MAYO CLINIC (Apr. 15, 2020), https://newsnetwork.mayoclinic.org/discussion/prescribing-an-overdose-a-chapter-in-the-opioid-epidemic/.
[168] Carly Baldwin, *Middletown Woman Bribed Docs to Prescribe Addictive Painkiller*, PATCH (May 30, 2018), https://patch.com/new-jersey/middletown-nj/middletown-pharma-saleswoman-implicates-insys-bribing-docs.
[169] *Id.*
[170] *SJ Doctor's License Revoked Over Painkiller Prescriptions*, COURIER POST (May 7, 2018), https://www.courierpostonline.com/story/news/local/south-jersey/2018/05/07/dr-vivienne-matalon-license-revoked-new-jersey-subsys-prescriptions/586556002/.
[171] *Id.*
[172] Timothy O'Shea, *New Jersey Enacts Strict Opioid Prescribing Law*, PHARMACY TIMES (Feb. 21, 2017), https://www.pharmacytimes.com/contributor/timothy-o-shea/2017/02/new-jersey-enacts-strict-opioid-prescribing-law.
[173] *Id.*

restricts initial opioid prescriptions to a five-day supply.[174] If a patient feels his or her pain has not subsided, the law allows the physician to add another five days to the prescription.[175] When these restrictions are violated, there are two enforcement options against prescription providers—license suspension with no criminal sanctions or indictment and trial.[176] When criminal charges are pursued, they usually are for "fraud or illegally prescribing controlled substances."[177] Due to the current epidemic, however, some prosecutors have even brought manslaughter and felony murder charges against physicians.[178]

While New Jersey is off to a good start, it is imperative that the state ramp up its prosecutions of doctors who are involved in dishonest schemes, such as the ones mentioned above if it wants to make progress in combating the opioid crisis. "When four out of five new heroin users are getting their start by abusing prescription drugs, you have to attack the problem at ground zero—in irresponsibly run doctors' offices," previous Attorney General Porrino said.[179] Not only should the state ramp up prosecutions to get to the root of the problem, but it should do so because of how especially heinous it is for licensed doctors to profit off of opioid addiction and do so based on the trust society places in them.

On the other hand, it is understandable why New Jersey is struggling to vigorously prosecute doctors when there are many factors that may contribute to illegitimate prescriptions. For example, doctors, themselves, may be victims of patient dishonesty or "doctor shopping." Doctor shopping is the practice of seeing various doctors to find someone willing to write a prescription for painkillers and/or visiting various doctors to get multiple prescriptions for

[174] *Id.*
[175] *Id.*
[176] Ken Lammers, Jr., *Rise of the Pills*, 15 UDC-DCSL L. REV. 91, 106 (2011).
[177] *Id.*
[178] *Id.*
[179] Davis, *supra* note 157157.

painkillers at one time.[180] While electronic health records have helped combat this form of deceit, not every doctor's office is equipped with such a system.[181] Patients may also flat-out lie about the persistence and severity of their pain.

In a 2003 survey, prosecutors found deceptive patients to be the most prominent factor in illegitimate prescriptions, followed by dishonest doctors.[182] "Labeling physicians as misprescribers for merely being fooled is improper. [P]hysicians have inappropriately faced sanctions simply for being fooled."[183] In fact, recent studies have indicated how easy it actually is for patients to fake pain.[184] Researchers found that, even after receiving training, people could not "detect real versus faked pain more than fifty-five percent of the time."[185] Accordingly, it is difficult enough to attach malpractice liability to a doctor who was fooled, let alone criminal liability.[186]

Moreover, pharmaceutical companies and their fraudulent marketing practices have played a role in the manipulation of doctors, as well. For instance, Purdue Pharma marketed its opioid analgesic as "less likely than other pain medications to cause abuse, addiction, tolerance, and withdrawal."[187] Accordingly, physicians were deliberately misinformed about the addictive tendencies of the drug they were prescribing.[188]

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[180] Kayla Matthews, *How EHRs Can Help Prevent Opioid Addiction*, PHYSICIANS PRACTICE (May 2, 2017), https://www.physicianspractice.com/ehr/how-ehrs-can-help-prevent-opioid-addiction; Lammers, *supra* note 176, at 96.
[181] *See id.*
[182] Kelly K. Dineen & James M. DuBois, *Between a Rock and a Hard Place: Can Physicians Prescribe Opioids To Treat Pain Adequately While Avoiding Legal Sanction?*, 42 AM. J. L. AND MED. 7, 36 (2016).
[183] *Id.* at 17.
[184] *See id.*
[185] *Id.*
[186] *Id.*
[187] Lammers, *supra* note 176176176, at 91.
[188] *Id.*

Lastly, another countervailing consideration that the state needs to keep in mind is that increased scrutiny on physicians may also lead to a chilling effect whereby doctors are hesitant to prescribe pain medication to patients who really need it. This could lead to patients' pain going untreated, forcing them to turn to the illicit drug market.

III. Is New Jersey Heading in the Right Direction?

In evaluating how New Jersey is using criminal law to combat the opioid epidemic within the state, it is best to consider its actions towards each key player, individually. With regard to how the state charges and prosecutes opioid users, New Jersey is on the right track by emphasizing treatment, while maintaining that illegal opioid users should retain some form of accountability. Decriminalizing the use of dangerous, illicit drugs altogether, and thus putting the focus entirely on treatment, may not be enough to give people the incentive they need to get help. A harsh reality is that sometimes addicts must "hit rock bottom" before they are fully incentivized to seek treatment. It is better that an addict's "rock bottom" be an arrest than a life-threatening overdose. On the other hand, incarceration without treatment will not be effective at combatting the opioid epidemic either. Addiction is a brain disorder that cannot be solved when someone is sitting behind bars.[189] Often times, prison sentences exacerbate the problem. Those who have recently been released from prison are forty times more likely to overdose than someone in the general public.[190]

Operation Helping Hand and Drug Courts are thus successful initiatives that allow prosecutors and law enforcement to find a healthy balance holding people accountable for their illegal conduct, while ultimately prioritizing rehabilitation over incarceration.[191] In regard to Operation Helping Hand, the fact that drug charges are not dropped shows that New Jersey is still

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[189] NATIONAL INSTITUTE ON DRUG ABUSE, DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION 4 (2007).
[190] Brandon D.L. Marshall & Abdullah Shihipar, *The Latest Failure in the War on Drugs*, NY TIMES (Nov. 19, 2019), https://www.nytimes.com/2019/11/19/opinion/drug-induced-homicide-overdose.html.
[191] *See supra* Part II.A.2, II.A.3.

utilizing and applying the criminal law uniformly to ensure there are consequences in place for those who engage in the purchase and use of illegal drugs. That being said, by coaxing drug users into treatment post-arrest, the state recognizes that addiction is ultimately a disease that requires rehabilitation, rather than just punishment. This program strikes a balance between holding users accountable while recognizing that rehabilitation is necessary.

One could argue that by not dropping the drug charges, the state will ultimately undermine its goals of promoting rehabilitation. This is due to the fact that having a criminal history could hurt one's chances of securing a job once he or she is clean. If recovering addicts have difficulties finding work, it is often the case that they resort back to their old ways of using drugs. Though, as mentioned previously, sentencing judges are often made aware of who is obtaining treatment, which can be used as a mitigating factor during sentencing.[192] Also, alternatives to prison time, such as Drug Courts, can help alleviate this concern, especially for non-violent illicit drug users. Lastly, sometimes "punishments" that distance users from not only the drugs themselves but also the people who encourage drug use may be necessary to further rehabilitative goals.

The New Jersey immunity statue also shows that the State is taking a step in the right direction when it comes to encouraging people to call for help when someone is experiencing an overdose. That being said, its purpose may be hindered due to the fact that whether or not someone is granted immunity from being charged often turns on arbitrary details. Consider the following example:

> John, George, and Pete are using drugs one night. Later that night, after Pete went home, John overdoses. George calls the authorities in order for John to receive proper medical attention. If police officers legally seized all of the drug paraphernalia, they could not use it to incriminate John or George. After all, the Overdose Prevention Act shields John (because he is the one who overdosed) and George (because he witnessed the overdose and made the call). However, if the authorities could link the chain of evidence to Pete, they could arrest him for drug

[192] Janoski, *supra* note 73.

> possession. Why? Pete left and never witnessed the overdose or made the 911 call.[193]

This example exemplifies how the state can work around the statue to secure convictions against people at the scene, or involved in some way, with the overdose. While people like Pete do not necessarily further the goal of the immunity statute, namely encouraging people to call for help when others are overdosing, the fact that the state may still prosecute Pete indirectly hinders the statute's goals. If people are aware of how the statute operates and that it turns on these arbitrary deals, they may not be as inclined to call for help in fear of being charged, or causing a friend to be charged, with some offense. Accordingly, as mentioned in the previous Section, the New Jersey Immunity Statute should be broadened to alleviate this effect.

The state's biggest deficiency is how it is handling the prosecutions of particular opioid dealers, specifically when a fatality results. The strict liability drug-induced homicide statute should be set aside because of the ineffective and unjust results that stem from it. Not only is the statute overly punitive, but it has also failed to generate the deterrent effect originally intended. Instead, it is often used to target low-level drug dealers, and impose the stiffest of penalties without addressing the root of the epidemic.

The rhetoric surrounding drug-induced homicide laws is that "the drug-supply is controlled by shady cartel figures and ruthless dealers who are stationed on American street corners."[194] Thus, many believe that if an overdose occurs, strict and punitive measures are warranted. In reality, though, people who supply drugs to those who overdose are often friends or family members, and often use drugs themselves.[195] New Jersey legislation fails to capture this nuance.

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[193] Adam H. Rosenblum, *Drug Overdose in New Jersey: The Overdose Prevention Act*, ROSENBLUM LAW (Sep. 23, 2013), https://rosenblumlaw.com/our-services/criminal-defense/new-jersey-drug-charges/drug-overdose-in-new-jersey-the-overdose-prevention-act/.
[194] Marshall & Shihipar, *supra* note 190.
[195] *Id.*

Additionally, the availability of this statute may be a vehicle for prosecutors to act on their implicit biases. Street dealers have more unfavorable stigmas attached to them than doctors, and prosecutorial discretion may lead to the state going after street dealers more aggressively solely for this reason. Further, it has been said that drug-induced homicide laws "represent a return to the outdated 'war on drugs' approach," which disproportionately affects communities of color.[196] And because fentanyl-related overdose deaths have sharply increased for people of color, we can expect drug-induced homicide laws to disproportionately and negatively those communities once again.[197] Accordingly, to avoid these consequences, New Jersey should eliminate its strict liability, drug-induced homicide statute.

In terms of prosecuting physicians, New Jersey is off to a good start; however, additional changes could still be made. Since the 1990s, physicians have played a core role in bringing about and fueling the opioid epidemic.[198] While many physicians at the time were deceived from pharmaceutical companies' aggressive marketing tactics, virtually every physician is now informed of the dangerous and addictive qualities of prescription painkillers. Accordingly, New Jersey should focus more of its resources on vigorously prosecuting the root of the problem, physicians, when they engage in illegal practices, rather than on low-level dealers and opioid users. Currently, while some doctors are being charged criminally, most are simply losing their licenses from the state licensing board. It is important for New Jersey prosecutors to carefully analyze each actor's level of culpability when determining what charges they will pursue and what sentences they will seek. This may seem like a simple solution, but sometimes only a thin line separates gross negligence from criminal activity. It is the prosecutor's job to ensure they are

[196] *Id.*
[197] *Id.*
[198] Gostin et al., *supra* note 1.

holding physicians and other players in the opioid epidemic similarly accountable for similar levels of culpability. New Jersey has recently fallen short in this respect. For example, Vivienne Matalon's license was revoked, but no criminal charges were filed against her, despite the fact she may have accepted bribes and knowingly prescribed a dangerous opioid when she knew it was most likely not appropriate for her patient. Matalon seems more deserving of a harsher penalty than someone like Jennifer Marie Johnson, who shared drugs with her husband and attempted to save his life when he subsequently overdosed.

IV. Conclusion

Overall, New Jersey has utilized the criminal law in various ways to combat the opioid epidemic: immunity statutes, Operation Helping Hand, drug courts, strict liability drug-induced homicide statutes, and more. While the state is primarily heading in the right direction, there is room for improvement in certain areas. Ultimately, the state should reassess how it prosecutes each key play and tailor its actions towards targeting root of the problem. If it does that, New Jersey can successfully use the criminal law to mitigate the effects of the opioid epidemic.